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IN THE

Supreme Court of the United States

October Term, 1955

No. [redacted]118

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,
Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Appellee.

PETITION FOR WRIT OF CERTIORARI.

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PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,
Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Appellee.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Hartford Accident and Indemnity Company, a corporation, prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for Ninth Circuit, entered in the above case on November 16, 1955, which reverses a Judgment in favor of Petitioner, by the United States District Court Southern District of California, and orders Judgment for Respondent in a Declaratory Relief Action in a diversity of citizenship case.

Opinions Below.

The opinion of the Court of Appeals is printed in Appendix, p. 1, and the case is reported in 228 Fed. Rep. and the opinion of District Judge James M. Carter is printed in the Appendix, p. 18.

Jurisdiction.

The judgment of the Court of Appeals was entered November 16, 1955. Petition for rehearing was seasonably filed and denied on March 27, 1956. The certiorari jurisdiction of this court is invoked under Title 28, U. S. C., Sec. 1254(1). We believe that this case presents grave questions as to when the Court of Appeals can ignore the established law of the state, in a diversity case, as contained in its higher appellate decisions; that the decision is contrary to decisions of the Supreme Court and of other Courts of Appeal; the decision in a diversity case applies the law of Ohio when the case arose in California; the decision brings into being a rule of law never before announced and certainly not in existence in California, which would promote thousands of mistaken judgments and many hundred of appeals in negligence cases if followed, until straightened out and overturned, and thus it presents a matter of general importance in which this court should be interested, as well ordering a judgment not authorized by the prayer or pleadings.

Questions Presented for Review.

1. Is the Court of Appeals, in a diversity case, permitted to adopt the rule of primary and secondary liability insurance when the findings and judgment of the District Court are based upon the law directly contrary thereto, properly and firmly founded upon four decisions of the California Appellate Courts, in which petitions for hearing by the California Supreme Court Were Denied?

2. In a diversity case, can the Court of Appeals, abolish the defenses of Contributory Negligence, No Contribution between Joint Tort-feasors and those in *pari delicto*, contrary to the laws of the state of the forum and the decisions of its courts of appeal and Supreme Court?

3. Can the Court of Appeals in such a case set up a rule on the application of the statute of limitations on the basis of a decision of a court in Ohio contrary to decisions by the Appellate Courts and Supreme Court of California?

4. If a contract states that it preserves the rights of the parties and prevents their waiver, does that give the Court of Appeals, when the District Court makes findings thereon, to state one party's rights is preserved thereby and the others is waived and then order a judgment not authorized by the pleadings or prayers?

Statement of Facts.

The court's statement of facts is pretty complete but in view of its decision one could be added for clarity. The Judgment in this case was filed on January 6, 1954. [Tr. of Rec. p. 127.]

ARGUMENT.

FIRST QUESTION.

Is the Court of Appeals, in a Diversity Case, Permitted to Adopt the Rule of Primary and Secondary Liability Insurance When the Findings and Judgment of the District Court Are Based Upon the Law Directly Contrary Thereto, Properly and Firmly Founded Upon Four Decisions of the California Appellate Courts, in Which Petitions for Hearing by the California Supreme Court Were Denied?

The Court of Appeals we believe has refused to follow the rule in *Erie R. Co. v. Tompkins,* 304 U. S. 64, and many other cases which followed and explained and amplified the doctrine of that case. Their reason for not following the doctrine was that they had rejected the same Court of Appeal's decisions of California before.

In California there are four cases which distinctly establish that in a controversy between the insurers of one person there is no primary and secondary liability.

Petitioner respectfully submits to this honorable court that the substantive law of the State of California has steadfastly held that there is no such doctrine as propounded by the Court of Appeals, to wit, dfferent degrees of liability in relation to joint liability for torts.

The case of *Consolidated Shippers, Inc. v. Pacific Employers Ins. Co.*, 45 Cal. App. 2d 288, 293, 113 P. 2d 34 (hearing by Supreme Court denied), holds that there is no law in the state, nor case upholding the theory of primary and secondary liability. The court there says at page 293:

> "Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judg-

ment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (Schilling v. Central Calif. Traction Co., 115 Cal. App. 30 [1 P. 2d 53]), or against both jointly, it would seem that there could be no such thing as primary and secondary liability.

". . . In view of our conclusion that both policies insured the same risk so far as a plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial. Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers."

A later California case, *Air Transport Mfg. Co. v. The Employers' Liability Assurance Corp.*, 91 Cal. App. 2d 129, 132, 204 P. 2d 647 (hearing denied by Supreme Court), holds that

"Another line of authorities holds that each insurer is primarily liable for the losses of its named assured and secondarily liable as an excess carrier for other losses. (Citing non-California cases.) This principle cannot apply in California for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission. (Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal. App. 2d 288 (114 P. 2d 34).)"

In a recent California case, in which Pacific Employers Insurance Company was an appellant, the court again re-

iterated its previous position, *Employers Liability Assurance Corp. of London, Eng. v. Pacific Employers Ins. Co.*, 102 Cal. App. 2d 188 (Supreme Court denied hearing), 227 P. 2d 53 at 193:

> "The theory that the insurer covering the primary tort-feasor is liable to its policy limits and the insurer covering the secondary tort-feasor is liable for excess insurance only has been rejected in California. (Consolidated Shippers, Inc. v. Pacific Emp. Ins. Co., 45 Cal. App. 2d 288, 114 P. 2d 34; Air Transport Mfg. Co., Ltd. v. Employers' Liability etc. Corp., 91 Cal. App. 2d 129, 204 P. 2d 647.)"

In the recent case of *Air Transport v. Employers Liability Co.*, 130 Cal. App. 2d 129, the court said at page 132:

> "This principal cannot apply in California for the reason that there is no such thing as primary and secondary liability between a vehicle owner and the operator thereof with permission. (Consolidated Shippers, Inc. v. Poe, Employers Ins. Co., 45 Cal. App. 2d 288 [114 P. 2d 34].)" (Supreme Court denied hearing.)

The Court of Appeals relies upon its two prior decisions on the same matter which rejected the cases above quoted from California and adopted the primary and secondary liability rule even though those cases were also dependent on California law because of diversity. They also cite with favor another case which is a diversity case dependent on Connecticut law. These cases are: *United Pacific Ins. Co. v. Ohio Casualty Co.*, 172 F. 2d 836 (9 Cir. 1949); *Canadian Indemnity Co. v. U. S. Fidelity & Guaranty Co.*, 213 F. 2d 658 (9th Cir. 1954); *Maryland Cas. Co. v. Employers Mutual Liability Insurance Co.*, 208 F. 2d 731 (2d Cir. 1953). (See Opinion p. 7, App. p. 8).

The Court of Appeals said on page 10 of the opinion:

> "Hartford maintains that there is no primary or secondary insurance theory applicable in California, citing three California appellate cases containing language to that effect.[13] The same argument was raised and rejected by this court in *Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., supra*, at 659-660. Our re-examination of the California cases leads us to a like conclusion, that in a situation such as is presented in the case at bar, where two insurance companies seek to determine the nature and extent of their liabilities *inter se*, the law is correctly stated in the *United* and *Canadian Indemnity* cases, *supra*."

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[13]Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal. App. 2d 288, 114 P. 2d 34 (1941); Air Transport Mfg. Co. v. Employers Liability Assur. Corp., 91 Cal. App. 2d 129, 204 P. 2d 647 (1949); Employers Liability Ins. Corp. v. Pacific Employers Insurance Co., 102 Cal. App. 2d 188, 227 P. 2d 53 (1951). And see Traders & Gen. Ins. Co. v. Pacific Employers Ins. Co., 130 Cal. App. 2d 158, 278 P. 2d 493 (1955).

We believe this was grave error in view of the unbroken line of decisions in California by the intermediate appellate court to the contrary, which has four times been approved by the Supreme Court by denying a hearing without comment. The Court of Appeals seeks to avoid the rule thus established as shown by its language above and in the cited cases.

In the *United Pac Ins. Co. v. Ohio Casualty Ins. Co.*, 172 F. 2d 836, 844, the Court of Appeals said at page 844:

> "United contends that there was 'double insurance' in this case under the doctrine of Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal.

> App. 2d 288, 114 Pac. 2d 34, and *Lamb v. Belt Casualty Co.*, 3 Cal. App. 2d 624, 40 Pac. 2d 311. Double insurance is defined in Section 590 of the California Insurance Code as existing 'where *the same person* is insured by *several insurers separately* in respect to the same subject and interest.' (Emphasis supplied.) We do not agree. If either Page dba Mission or McKeon and Paige dba Pacific were insured by several insurers there would be double insurance. The Consolidated and Lamb cases, *supra*, involved policies issued by different companies *to the same assured* not to different assureds and did involve double insurance."

and at page 845:

> "We agree with Ohio that this case involves no problem of pro-rating insurance but rather, presents the question of who carries insurance on the ultimately liable single tort-feasor—Gilbert."

There it was just one automobile involved, two defendants, the owner and employer and there was no independent negligent act asserted against employer as in the instant case.

In *Canadian v. U. S. Fidelity & Guaranty Co.*, 213 F. 2d 658, the Court of Appeals, referring to *Consolidated* case (California) said:

> "The appellate court reversed the trial court, rejecting the idea of primary and secondary liability. It is believed, however, that it is important to that decision that the suit was brought by Consolidated against its insurers, rather than by either Consolidated or Company 'B' against either or both Harvey and Company 'A.' The court simply held that: 'so *far as plaintiff* is concerned, the risk covered by each policy was the same'." (Emphasis added.)

Then the Court of Appeals refused to follow rule there set out *re* primary and secondary because inferentially it says the Appellate Court in the *Consolidated* case should not have done so.

This court recently pointed out the necessity of following state court decisions as to the law of the state even though the rule is dictum therein.

In the case of *Wood v. Interstate Realty Co.*, 337 U. S. 535, this honorable court said at page 535:

> "The Court of Appeals concluded that the latter reason was argumentary, the real basis of the decision being that Bullington was denied recovery on the doctrine of *res adjudicata*. But where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*. United States v. Title Ins. Co., 265 U. S. 472, 486; Massachusetts v. United States, 333 U. S. 611, 623."

and at page 538:

> "a federal court is 'in effect, only another court of the state'."

Other cases have stressed the importance of a careful consideration of the state rules as found in their decisions and laws.

In the case of *New York Life Ins. Co. v. Jackson*, 304 U. S. 261, life insurance policy provisions were construed and the court said at page 262:

> "The court considered the question as one of general law. Its decision should have been made according to the applicable principle of the state law which governed the interpretation of the policy. Erie R. Co. v. Tompkins, *ante*, p. 64; Ruhlin v. New York Life Insurance Co., *ante*, p. 202."

and at page 205:

> "The decision in Erie v. Tompkins, *ante*, p. 64, goes further, and settles the question of power. The subject is now to be governed, even in the absence of state statute, by decisions of the *appropriate* state court. The doctrine applies though the question arises not in an action at law, but in a suit in equity."

and at page 206:

> "The rules indicate that the Court will be persuaded to certiorari where a Circuit Court of Appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions'."

and at page 209:

> "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts."
>
> "Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."

Again in *Guaranty Trust Co. v. York*, 326 U. S. 99, 112, this court said:

> "The source of the substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the states. Whenever that law is authoritatively declared by a state, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded

on that law, whether the forum of application is a state or federal court and whether the remedies be sought at law or may be had in equity."

In fact this court has said the lower court's investigation and finding on local law is to be respected and it will not be disturbed except on the clearest showing of error. The learned District Judge, mindful of these cases just cited, followed the California rule and the Court of Appeals does not believe it should and "reject" it. This was error.

This honorable court said in *Palmer v. Hoffman*, 318 U. S. 109, 118:

> "We are referred to no New York decision involving the point. The propriety of applying the rule of the Fitzpatrick case to the causes of action based on the Massachusetts statute may be arguable. But it is not the type of ruling under Erie R. Co. v. Tompkins, *supra*, which we will readily disturb. Where the *lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error.*" (Emphasis added.)

In the case of *Huddleston v. Dwyer*, 322 U. S. 232, 236, ths court said:

> "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. Erie v. Tompkins, 304 U. S. 64; Federal Rules of Civil Procedure, Rules 69(a), 81(b); 23 U.S.C. following Sec. 723(c). It is the duty of the federal appellate court, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. Meredith v. Winterhaven, 320 U. S. 228." (Case remanded to consider decisions of state court.)

Other cases strengthens the rule and showed the error complained of to be one on which certiorari should issue to correct it.

Helvering v. Leonard, 310 U. S. 80 (court relied on Appellate Div. decisions *re* N. Y. law);

Six Companies v. Joint Highway District, 311 U. S. 180 (9th Cir.) (Appellate Court decisions not recognized);

Fidelity Trust Co. v. Field, 311 U. S. 169, 179;

West v. A. T. & T. Co., 311 U. S. 223, 236;

Stover v. New York Life Ins. Co., 311 U. S. 464 (Kansas City Court of Appeals decision, an intermediate state appellate court relied on);

Vanderbork v. Owens-Illinois Glass Co., 311 U. S. 538;

Moore v. Illinois Central R. Co., 312 U. S. 630, 632;

Klaxon v. Stenton Electric Mfg. Co., Inc., 313 U. S. 487;

Griffin v. McCoach, 313 U. S. 498, 503 (relied on decision of U. S. Court and not of Texas; reversed);

Meredith v. Winterhaven, 320 U. S. 228, 237 (held, lower court must decide even though difficult as highest state court has not decided question);

Rules of Decision Act (28 U. S. C. 1652).

From the foregoing it will be seen that this court showed as it said in the *New York Life Insurance* case, *supra* "certiorari where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local *discussions.*" (Emphasis added.)

SECOND QUESTION.

In a Diversity Case, Can the Court of Appeals, Abolish the Defenses of Contributory Negligence, No Contribution Between Joint Tort-feasors and Those in Pari Delicto, Contrary to the Laws of the State of the Forum and the Decisions of Its Courts of Appeal and Supreme Court?

The Court of Appeals has been reading the words of decisions, without relation to their facts we think and has been misled into deciding this case wrongly and this despite the fact that it has stated fairly the position of the parties and the facts herein.

This case is factually dissimilar from the following cases relied upon by the Court of Appeals.

(1) *United Pacific Ins. Co. v. Ohio Casualty Co., supra;*

(2) *Canadian Indemnity Co. v. United States Fid. & Guar. Co., supra;*

(3) *Maryland Casualty Co. v. Employers Mutual Liability Ins. Co.,*

(4) *Benson v. Southern Pacific,* 177 Cal. 777, 171 Pac. 948;

(5) *McInerney v. United Railroads,* 50 Cal. App. 538, 171 Pac. 958;

(6) *Jameson v. Gavett,* 22 Cal. App. 2d 646, 71 P. 2d 937;

(7) *Davison v. Diamond Match Co.,* 10 Cal. App. 2d 218, 51 P. 2d 452;

(8) *Bradley v. Rosenthal,* 154 Cal. 420, 97 Pac. 875.

In all of them there was the admitted or alleged or proven fact that a person who committed an act had created liability for another under the rule of *respondeat superior* or else a jury having exonerated an agent for

the doing of an act for which his principal was liable by operation of the doctrine of *respondeat superior* the principal was likewise to be exonerated. This is law which is recognized pretty generally but the Court of Appeals seeks to twist other phases of these cases into a non-existant rule.

The court says about 1, 2, 3, as follows:

> "The effect of these cases, or the rule to be drawn from them, may be stated in this way: An insurer providing extended coverage is ultimately liable as against an insurer providing coverage only to the named insured, where the named insured's liability is vicarious only, and that named insured has a right of recovery over against the person or persons primarily liable, to whom coverage has been extended only by the extended coverage provision of the first insurer."

Passing for a moment that this is incorrect under our First Question; the court recognizes findings of the trial court and positions of Petitioner which would negative this statement and "excepted the case from the operation of the primary secondary liability theory" (Op. p. 7), but then escapes from such without particularly saying how it is done and certainly refusing to recognize the total inapplicability of the authority as used to accomplish this.

The Court of Appeals says:

> "The trial court found that Neil was a tort-feasor jointly with the truck driver and the flagman, because of the negligence of three supervisory employees, and any action by Neil against the truck driver and the flagman would be seeking contribution between joint tort-feasors, frowned on by the California courts in actions where their concurrent negligence makes them joint tort-feasors. *Smith v. Fall River Jt. Union High School Dist.*, 1 Cal. 2d 331, 34 P. 2d 994 (1934);

Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389 (1921). Furthermore, Neil would then be subject to a defense of contributory negligence and would be profiting from its own wrong."

Ths is correctly stating the premise. In the case at bar then there were two negligent acts, one by the driver and flagman and another by the supervisional employees of Neil who told the driver and flagman to do what they were doing and failed to correct the situation after knowledge of the danger.

In none of these cases, 1 to 8, was there such an element. But the Court of Appeals says that if the other three employees were doing such acts as would make the employer Neil liable in damages for such negligence by reason of the doctrine of *respondeat superior*, that this negligence does not count in erecting the barrier of contributory or joint tort-feasor or *pari delicto* as a bar to the principals action against other negligent employees contributing proximately to the accident. The court mistakes the reason for the rulings in the cases. In all of them they were talking about the same employees not different ones. And certainly in none of them was the doctrine announced that if a corporation sues a negligent employee for recoupment of money paid in damages to a third person injured by the employees negligence, that the contributory negligence of the employer, if imputed to him from the acts of other employees is not applicable because under the doctrine of *respondeat* a principal may sue a negligent employee for his losses and also because when a pirncipal and agent are sued and the agent is exonerated the principal is also exonerated unless the act was directed by the company or it was guilty of other independent negligence.

The Court of Appeals in ruling on the matter stated:

> "If, however, Neil is liable on an imputed basis, because of *respondeat superior*, then it would have the right of recovery against its own employee, and that right would pass to Pacific through subrogation. *Bradley v. Rosenthal*, 154 Cal. 420, 97 Pac. 875 (1908); *Myers v. Tranquility Irr. Dist.*, 26 Cal. App. 2d 385, 79 P. 2d 419 (1938).
>
> "The trial court's finding on this testimony that such negligence rendered Neil liable as a joint tort-feasor and not solely on the basis of *respondeat superior* is, in our opinion, erroneous. Under California law, when the tort is committed in accordance with the express orders of corporate officers or agents carrying out corporate policy, the corporation is a joint tort-feasor [*Benson v. Southern Pacific*, 177 Cal. 777, 171 Pac. 948 (1918); *McInerney v. United Railroads*, 50 Cal. App. 538, 195 Pac. 958 (1920)], and the corporation is jointly liable when the tort by the employee is expressly ratified by the corporation. *Jameson v. Gavett*, 22 Cal. App. 2d 646, 71 P. 2d 937 (1937); *Davison v. Diamond Match Co.*, 10 Cal. App. 2d 218, 51 P. 2d 452 (1935). However, if the tort is the undirected act of the employee acting within the scope of his employment, the corporation is liable solely under the doctrine of *respondeat superior*. *Bradley v. Rosenthal*, 154 Cal. 420, 97 Pac. 875 (1908). The testimony shows that the three supervisory employees failed to take steps to prevent the accident. It cannot be said on this state of the record that they were carrying out corporate policy, and there is no evidence that their acts, or omissions, were ratified by Neil."

This in effect is saying because the corporation can sue an employee for damages paid out for his negligent act

in a case where the corporation was held in by the doctrine of *respondeat superior*, just those words in the decisions would exculpate the corporation from the negligent acts it commits otherwise by other agents who are equally wrong if the corporation is liable for their acts under the doctrine of *respondeat superior*. This too is true even though such agents are supervisory employees and direct the first negligent employee to carry out the negligent act. Such reasoning is not in the above cases cited and no hint of such is therein found but results in applying general principles taken from cases factually dissimilar.

Indeed in one of the cases relied upon by the Court of Appeals the very point is decided the other way: In the case of *Bradley v. Rosenthal*, 154 Cal. 420, 97 Pac. 875, the court said:

> "Upon the general question here presented as to the correlative rights of master and servant, principal and agent, to indemnity, Cooley thus clearly enunciates the well-settled principle (1 Cooley on Torts, 3d ed., p. 255): 'A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and its servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servants, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself. On the other hand, suppose the servant be directed by the

officers of the company to do a certain act which it turns out they had no right to do, and for doing which he is made to pay damages. Here, if the act was a plain and manifest wrong, as would be leaving the cars to commit a battery, the servant can have no indemnity, because he must have known the act to be unlawful, but if the act directed was one he had reason to suppose was legal, and he obeyed directions on that supposition, it would ill become the railroad company to demand that he be treated as a wrong-doer when called upon to indemnify him against the consequences of the act its officers had directed. In such a case the servant is not in morals a wrong-doer at all, and his claim to indemnity would be based upon a faithful obedience to orders which he had a right to presume were rightful, nothing to the contrary appearing.' (See, also, 9 Ency. of Law & Prac., p. 807; 9 Storey on Agency, p. 271; Bailey v. Bussing, 28 Conn. 453; Old Colony R. R. Co. v. Slavens, 148 Mass. 363, [12 Am. St. Rep. 558, 19 N. E. 372]; Grand Trunk Railway Co. v. Latham, 63 Me. 177; Featherson v. Newburgh & C. Turnpike, 71 Hun. 109 [24 N. Y. Supp. 603]; New Orleans etc. R. R. Co. v. Jopes, 142 U. S. 18, [12 Sup. Ct. 109]; Montfort v. Hughes, 3 E. D. Smith, (N. Y.) 591; Culmer v. Wilson, 13 Utah, 129, [57 Am. St. Rep. 713, 44 Pac. 833].)"

And this court refused to allow recoupment in a case of passive negligence by employees whose contributory negligence was referred to the employer under the doctrine of *respondeat superior*

In the case of *Union Stock Yards Co. v. Chicago B. & Q. Ry. Co.*, 196 U. S. 217, 228, 49 L. Ed. 453, 457, 25 S. Ct. 226, Union was suing to recover damages paid

its employee suffered by reason of a defective car furnished by C. B. & Q. which *both* could have discovered. The court said:

> "In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining injury thereby. We do not think the case comes within that exceptional class which one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another."

And in another Court of Appeals case the court took an entirely different view and these makes the present opinion in conflict with that one.

In the case of *Fid. and Casualty Co. v. Federal Express*, 136 F. 2d 35, 41, the court said:

> "But the negligence of plaintiff's insured, proximately resulting in the damages, under any claim or theory, was concurrent negligence. There can arise no issue of primary and secondary liability—or question of active or passive negligence—between joint tort feasors where their concurring act of negligence results in injury to a third party. There can be no secondary liability where both joint tort-feasors are *pari-delicto* as between themselves.
>
> "On the record and the pleadings before us, there could arise no issue of primary or secondary liability for negligence. Plaintiff, under the circumstances disclosed in this case, was not entitled to maintain an action against defendants for indemnity on the ground that they were primarily liable for the damages in the negligence case."

The court quotes on page 41,

> "Restatement, Restitution, Sec. 102, Concurrent and Joint Negligence where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both become liable in tort to the third person, one of them who has made expenditures in the discharge of their liabilities is not entitled to contribution from the other."

A well reasoned case which denied indemnity under similar circumstances was *Alaska Pacific S.S. Co. v. Sperry,* 211 Pac. 761 (S. Ct., Wash.).

This was a case where a longshoreman at work was injured while loading his employers (plaintiff's) ship at defendant's dock, by reason of the collapse of a plank furnished by defendant Sperry, but which his employer was under duty to inspect also for defects, which could have been discovered. Plaintiff was held in suit by employee and sues for indemnity against defendant Sperry.

Held: that the steamship company was liable as a joint tort-feasor and cannot recover from Sperry company who furnished plank and was primarily liable to keep it safe, as between the parties to the accident; this primary duty of Sperry did not relieve plaintiff from duty of exercising care in the control of appliances which it called upon its servants to use, at the risk of becoming a joint tort-feasor and the denial of the right to recover over from the one primarily liable.

From the foregoing it clearly appears there is no basis in the cases cited or in sound reasoning for the decision of the Court of Appeals, and it is in conflict with California decisions, other decisions, U. S. Supreme Court decisions, and Court of Appeals decisions and certiorari should issue to correct it.

THIRD QUESTION.

Can the Court of Appeals in Such a Case Set Up a Rule on the Application of the Statute of Limitations on the Basis of a Decision of a Court in Ohio Contrary to Decisions by the Appellate Courts and Supreme Court of California?

On this point the Court of Appeals says:

> "The trial court held that Pacific's subrogation rights, if any, would have accrued on the date of the settlement with Carter, January 27, 1951, and because the action for declaratory relief was tried in March 1952, Pacific at that time would be barred by a one-year statute of limitations[14] pertaining to an action against the truck driver and the flagman. We find this ruling to be erroneous for two reasons.
>
> "Although an insurer subrogated to the rights of an insured is subject to the same statute of limitations as the insured [*Automobile Ins. Co. v. Union Oil Co.*, 85 Cal. App. 2d 302, 193 P. 2d 48 (1948)], still an action by Pacific as subrogee of Neil against the two employees would not be a personal action but rather an action for the enforcement of a right based upon an implied contract of indemnity [*Ohio Casualty Co. v. Capolino*, 44 Ohio L. Abs. 564, 65 N. E. 2d 287 (1945)], and a two-year statute of limitations would be applicable.[15] Thus, either Neil or Pacific could have brought an action against the employees prior to January 27, 1953."

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[14]California Code of Civil Procedure, Sec. 340(3).

[15]California Code of Civil Procedure, Sec. 339(1); see Restatement, Restitution, Sec. 96.

The findings and judgment, however, was filed on January 7, 1954, which under the court's erroneous ruling would still bar the claim.

However here again the Court of Appeals violated the Rules of Decision Act and *Erie R. Co. v. Tompkins, supra*, and other cases. And it is done on the basis of an Ohio decision ignoring a California decision cited by the court.

The *Automobile Insurance Company* case above was a subrogation case also and the court ruled distinctly that the law of limitations as to torts applied and not implied contract when the plaintiff as subrogee for damages paid out on a policy of insurance, where the damages were caused by another's negligence, and that Section 338, paragraph 3, would apply to the case of injury to property and the mere fact that there was insurance and a party was subrogated thereby did not operate to extend the statute for the subrogee, but such subrogee stood in the shoes of its assured and the same length of time to sue was granted it and no more; furthermore it was held such a suit was not "rested upon the general liability not founded upon an instrument in writing" referred to in subdivision 1 of Section 339. (P. 309.) (Refers to Code of Civil Procedure.)

The court said in the *Automobile Insurance* case at page 304:

> "[1] We are convinced that among the rights of an insurance company to recover a loss paid by it, which rights are claimed by subrogation to the rights of an insured against a third party responsible for a fire, there is included the right to the same statute of limitations period that applies to its insured. When the claim which the insured allegedly had against defendant herein was satisfied by plaintiffs they were

subrogated to the position of Aero Tool Company, the insured. Having been so subrogated to the rights of the insured in respect to its claim against defendant, the plaintiffs herein are entitled to the benefit of every right, lien and security which existed in favor of the insured. Manifestly, whatever period of limitation was applicable to the insured herein passed by subrogation to the insurance carriers, who by reason of such subrogation are put in the place of the party to whose rights they are subrogated. Upon principles of reason as well as natural justice, it seems only fair, right, just and equitable that one who is subrogated to the rights and remedies of another should be allowed the same time in which to enforce such rights that the law would have allowed to the person to whose rights and remedies he succeeds. (*Pond v. Dougherty*, 6 Cal. App. 686, 689 [92 P. 1035]; 23 Cal. Jur. §§ 11, 12, p. 930; *Watts v. Eufaula Nat. Bank*, 76 Ala. 474, 479; *Sparks v. Childers*, 2 Ind. Terr. 187 [47 S. W. 316]; *McClure v. Johnson*, 10 Okla. 663, 668 [65 P. 103]; Pomeroy's Equity Jurisprudence (2d ed.), § 2351, p. 5203; *Smith v. Davis*, 71 W. Va. 316 [76 S. E. 670, 672, 43 L.R.A.N.S. 614].)"

The accident in question occurred on November 18, 1947, and action by Pacific was barred by Code of Civil Procedure, Section 339, paragraph 3, on November 19, 1948, five years before the judgment herein.

It will be seen from this that the decision in this case was again based upon and had for its life a violation of the principles of *Erie R. Co. v. Tompkins*.

FOURTH QUESTION.

If a Contract States That It Preserves the Rights of the Parties and Prevents Their Waiver, Does That Give the Court of Appeals, When the District Court Makes Findings Thereon, to State One Party's Rights Is Preserved Thereby and the Others Is Waived and Then Order a Judgment Not Authorized by the Pleadings or Prayers?

Although the District Judge made distinct findings which it had a duty and a right to do, with respect to the contract between Pacific and Hartford under which Carter the injured third party was paid by them, the Court of Appeals makes different findings thereon and without good reason.

The inherent defect in the Court of Appeals reasoning is patent. Here is what the opinion recites:

> "More persuasive, however, is the fact that prior to the time Carter's action for damages was settled, Pacific and Hartford were parties to an agreement, dated January 15, 1951, which contemplated the settlement and which had been entered into to protect any claim of waiver of the provisions of the policies of insurance or from any claim of voluntary action, and to preserve all such rights to the contracting parties. It also contained a recital relating to the pendency of the action for declaratory relief 'which suit has as its purpose the declaration of the liabilities of each of the said insurance companies in respect to' the Carter action. Other pertinent provisions of the agreement are set forth in note 12.
>
> "We believe that under the agreement the parties expressly waived any rights predicated on the passage of time, and Hartford may not now prevail in its attempt to alter the intent of the parties so clearly expressed in the agreement.

"The judgment is reversed and remanded with directions to enter judgment for Pacific against Hartford in the amount of $11,160, which sum represents the money expended by Pacific in the Carter action.

(Endorsed): Opinion. Filed Nov. 16, 1955.

Paul P. O'Brien, Clerk."

(Op. p. 13, App. p. 17.)

The court says the contract was entered into to protect any claim of waiver of the provisions of the policies, or from claim of voluntary action, and to preserve all such rights to the contracting parties. Then the court says in effect that all rights of Pacific are reserved and protected from the statute of limitations claim but that Hartford and the two employees of the Neil Company, the driver and the flagman who were not signators to the contract, waived the defense of the statute of limitations *which is a personal privilege*. At that time when the contract was signed January 15, 1951, the Carter case had not been settled, the statute of limitations had already run on Pacific's claim under the rule of *Automobile Ins. Co. v. Union Oil Co., supra*, and at the time of the judgment January 7, 1954, Pacific had not filed its suit on subrogation; it was almost three years after the settlement on January 27, 1951, six years after the accident on November 16, 1947.

Moreover the suit was not one for money as the court seems to think but to ascertain and declare the rights of the parties under the various insurance contracts and for such other relief as may seem meet and just.

Surely in a declaratory relief action as such it is not proper to say that a contract to preserve the rights of the parties will affect a waiver as to one party's rights and add the benefit of the preservation of the rights to the other.

And certainly the Court of Appeals was not authorized to order judgment against the Hartford in a specific sum, as the pleadings and prayers of neither party authorized such but only ask for the declaration of their rights. Therefore there has been nine years passed and Pacific has not done anything about their subrogation rights and the declaratory relief action nor the contract between Pacific and Hartford never mentioned any such sleeping on rights as being saved. If such was intended the language should have been clear and not subject to interpretation.

Conclusion.

It appears clear that Petitioner is entitled to Certiorari on the Four Questions mentioned and that the Court of Appeals' decision is not only in conflict with this court's decisions and decisions of other Courts of Appeal, but also in conflict with the law of California embodied in its decisions, and therefore the opinion does not follow this court's rule established in *Erie R. Co. v. Tompkins,* and further it is clearly lacking in jurisdiction to order a judgment against Hartford not authorized by the pleadings or prayers of either party.

Wherefore, we respectfully and earnestly submit that for each of the reasons submitted a Writ of Certiorari should issue and for which respectfully pray for this court's order thereon.

Dated: May 25, 1956.

WALTER O. SCHELL,
Attorney for Petitioner.

JAMES V. BREWER,
Of Counsel.

APPENDIX.

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Pacific Employers Insurance Company, a Corporation, Appellant, vs. Hartford Accident and Indemnity Company, a Corporation, Appellee. No. 14,254.

Nov. 16, 1955.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before Stephens and Fee, Circuit Judges, and Wiig, District Judge.

WIIG, District Judge.

Pacific Employers Insurance Company (Pacific) appeals from an adverse judgment in an action for declaratory relief brought against it by Hartford Accident and Indemnity Company (Hartford). The respective liabilities of the two companies under their policies of insurance because of injuries to one Richard D. Carter presented a controversy within the jurisdiction of the United States District Court under 28 USCA §§1332 and 1391.

Minnesota Mining and Manufacturing Company (Mining Company) entered into written contract with the Wm. P. Neal Company (Neil) whereby Neil was to construct a roofing granules plant on Mining Company property in Riverside County, California. As part of its cost-plus contract, Neil was required to prepare the site for an electric power substation on the property. The substation was to be built by the California Electric Power Company (Electric Company) under a separate agreement with Mining Company. An easement in gross was granted by Mining Company to Electric Company to enter the premises and construct the substation.

The site of the power substation was on a hill which Neil had leveled and on which had been constructed a retaining wall. Neil was filling in behind this wall with decomposed granite in order to bring the ground level up to the wall level. In this work, Neil used two dump trucks belonging to Mining Company. The trucks were backed parallel to the retaining wall where the backfilling was going on. Neil's flagman would signal to the truck driver the point at which to dump the load onto the fill.

When Neil had nearly completed the backfilling operations, Electric Company personnel entered the leveled site below the wall to begin laying concrete foundations for the substation. On November 18, 1947, a large rock dumped from one of the trucks rolled over the retaining wall and injured Carter, an employee of Electric Company, who was working below. Carter brought an action against the Mining Company, Neil and others in the state court of California on November 16, 1948.

As required by agreement with Mining Company, Neil had taken out two policies of insurance, each in the amount of $50,000. The policy with Pacific was for "public liability" and the policy with Hartford was for "automobile public liability."[1] While the Carter action was still pending in the state court, Hartford, on March 18, 1950, brought the action for declaratory relief against Pacific to determine their respective liabilities in regard

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[1]The contract between Mining Company and Neil required Neil to take out and maintain "public liability and property damage insurance . . . to protect the Contractor from damage claims arising from operations under this contract . . ." A separate clause provided for "automobile public liability insurance and property damage liability insurance on all motor vehicles engaged in operations under this contract . . ."

to the policies covering Neil.[2] Thereafter, in January 1951, the Carter action was settled by Hartford and Pacific, each paying one-half of $22,320 under an agreement preserving the rights of each in the declaratory relief action.

At the trial, Pacific claimed the entire loss should fall to Hartford, urging two principal grounds:

(1) The Pacific policy does not apply to the Carter accident because of an exclusion clause relating to automobiles on property not owned, rented or controlled by the insured, Neil;

(2) Even if the Pacific policy provides "coverage" to Neil, there is no liability as against Hartford, whose insurance is primary while Pacific's is only secondary.

The trial court rejected each of these contentions, holding that both insurers were equally liable on their policies and were co-insurers of Neil relating to the Carter accident.

Hartford does not dispute its liability under its policy, which offered coverage broad enough to include the Carter accident.[3] Its position is that the Pacific policy also pro-

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[2]Two other insurance companies were involved in the action. Anchor Casualty Company and United States Fidelity & Guaranty Company had insured the Mining Company. Motions for summary judgment were granted in their favor by the trial court and those policies are not involved in this appeal.

[3]Hartford's policy extends coverage to "any person while using an owned automobile or a hired automobile." The policy also declares that the "Use of an automobile includes the loading and unloading thereof." The trial court found that the dump truck used by Neil was a "hired automobile" within the meaning of the policy, and that the dumping operations at the retaining wall came within the definition of "unloading." Hartford's attorney conceded at the trial that its policy covered Neil.

vided "coverage" to the risk involved, making each an equal insurer of Neil with respect to Carter's claim.

An exclusion of the Pacific policy provided that "This policy does not apply: . . . to . . . (1) automobiles while away from premises owned, rented or controlled by the Insured . . ." Neil, the insured, did not own or rent the area, and the question narrows to its "control" of the premises. On this issue the trial court found that Neil, is general contractor for the entire project, had "general control of the premises" owned by Mining Company, so that the exclusion in the Pacific policy did not come into effect.

The original agreement between Mining Company and Neil indicates that Neil was to be responsible for the management and supervision of the entire project, subject only to certain rights reserved to Mining Company as to selection, inspection and performance of the work. Neil assumed full responsibility for performance of the work in all respects: for checking all material and labor entering the work; for the protection of the work; for providing danger signals and warnings; for the safety of equipment used; for the correctness of all measurements; and for keeping the word, streets, alleys and ground free from rubbish. Under these provisions, Neil maintained guards to keep unauthorized persons out of the construction area, and the evidence shows that Mining Company's resident engineer represented his company primarily to inspect the work done by Neil, not to supervise.

The word "control" has no strict or technical definition which necessarily excludes all others. Black's Law Dictionary (4th Ed.), p. 399, defines "control" as "Power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee." It is said in

Rose v. Union Gas & Oil Co., 297 Fed. 16, 18 (6th Cir. 1924), "The word 'control' does not import an absolute or even qualified ownership. On the contrary, it is synonymous with superintendence, management, or authority to direct, restrict or regulate." *Accord*, L. L. Jarrell Construction Co. v. Columbia Casualty Co., 130 F. Supp. 436 (S.D. Ala. 1955); J. G. Speirs & Co. v. Underwriters at Lloyd's, 84 Cal. App. 2d 603, 191 P. 2d 124 (1948). These definitions lead us to accept the conclusion reached by the trial court, that Neil had such control of the premises that the exclusion in Pacific's policy did not come into effect.

Pacific also contends that the easement granted to Electric Company was separate and independent from Mining Company's agreement with Neil; that Neil had no control over Electric Company's operations, and that the easement acted to give control of the substation site to Electric Company rather than Neil. The trial court found that the easement, which was recorded, allowed Electric Company to construct, maintain, operate, inspect, repair, replace and remove electric lines on the premises, but was not such a right as would destroy the control of the premises by Neil; nor was it ever exercised or intended to be exercised on the portions of the premises where the backfilling operation was in progress.

The granting of the easement to Electric Company did not divest Mining Company of the incidents of ownership over the premises, and Mining Company could make any reasonable use of the land so long as it was not clearly inconsistent with the easement. City of Pasadena v. California-Michigan Land & Water Co. 17 Cal. 2d 576, 110 P. 2d 983 (1941); Langazo v. San Joaquin Light & Power Co., 32 Cal. App. 2d 678, 90 P. 2d 825 (1939);

Dierssen v. McCormack, 28 Cal. App. 2d 164, 82 P. 2d 212 (1938). The transfer of control over the premises to Neil is consistent with the granting of the easement to Electric Company. While it may be true that Electric Company was acting independently of Neil in beginning its work, until such time as Neil had completed filling in behind the retaining wall it still was responsible for the management and control of the site. The easement did not lessen that control.

In addition, the area where Neil's crew was working, behind the retaining wall, was exclusively within Neil's control, and the accident occurred because of the dumping operations there. The authorities cited by Pacific on this point do not alter the trial court's finding, which we accept. The conclusion that Neil controlled the premises means that both policies covered Neil's liability for the Carter accident.

It is contended by Pacific that the Hartford policy afforded primary insurance while the Pacific policy gave only secondary insurance, making Hartford primarily liable for payment up to the amount of its policy limits.[4]

Under the terms of its policy, Pacific agreed to pay all sums Neil, a corporation, might be obligated to pay by reason of liability imposed by law on Neil arising out of claims for personal injury and property damage. Hartford's policy insured Neil and "any person while using an

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[4]Hartford's policy limit is $50,000 for each person, well above the settlement figure of $22,320.

owned automobile or a hired automobile . . ." There is no question that Neil's corporate liability was covered by both policies and that it had double insurance.[5] Pacific urges, however, that Hartford's policy, in addition to insuring Neil, also insured the truck driver and the flagman, who were two of the five employees found to be guilty of negligence in connection with the Carter accident.[6]

Pacific's theory is that where two insurers cover a given risk, but one policy provides extended coverage so as to insure the ultimately liable individuals, while the other covers only the namer insured, whose liability is vicarious, and the named insured has a right of recovery over against the persons primarily or ultimately liable, then the insurer of the named insured is subrogated to the rights of the named insured and has a right of recovery against those ultimately liable and against the insurer providing extended coverage.

Explained in terms of the present controversy, Pacific argues that while both policies cover Neil's corporate liability, only Hartford's provides extended coverage to the truck driver and the flagman, who were the primarily liable tort-feasors. Under California law, Neil, liable

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[5]Double insurance is defined in California Insurance Code, §590, as: "A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest."

[6]The trial court found that the truck driver and the flagman were covered by Hartford but that Pacific's policy did not insure "anyone other than the Wm. P. Neil Company and did not, as respects to the truck in question, extend its insurance to the truck driver and flagman." Neither policy can be said to have covered the three supervisory employees who were found to be negligent.

vicariously through the doctrine of *respondeat superior,* can recoup his losses from the driver and the flagman.[7] Pacific, as insurer of Neil only, and under its rights of subrogation, can recover from Hartford, who also insured the negligent driver and flagman.

This was Pacific's position during the trial. The trial judge, although not rejecting the law argued, did make findings of fact which excepted the facts of the case from the operation of the primary-secondary liability theory. The relevant findings are in substance:

(1) The negligence of the supervisory employees of Neil through acts and omissions in the management of the loading and dumping operations renders Neil itself negligent, defeating any right of recovery over against the flagman and driver since there is no contribution between joint tort-feasors and the defense of contributory negligence could be asserted against Neil;

(2) The statute of limitations had run on any claim of Neil against its employees, for recoupment before the trial of this case, and any rights in Pacific to subrogation would likewise be barred.

Three cases support the legal proposition urged by Pacific. In United Pacific Ins. Co. v. Ohio Casualty Co., 172 F. 2d 836 (9th Cir. 1949), two insurers covered separate partnerships. One of the insurers provided ex-

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[7]United Pacific Ins. Co. v. Ohio Casualty Co., 172 F. 2d 836 (9th Cir. 1949), footnote 5 at 840: "An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee. See Johnston v. City of San Fernando, 35 Cal. App. 2d 244, 246, 95 P. 2d 147; Myers v. Tranquility Irr. Dist., 26 Cal. App. 2d 385, 389, 79 P. 2d 419."

tended coverage to the individual whose negligence resulted in injury to another. In an action between the two insurers following a settlement, the court held that the insurer of the ultimately liable tort-feasor must bear the loss. Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., 213 F. 2d 658 (9th Cir. 1954),[8] followed the United case, in theory. In discussing United, the court says, at page 659:

> "In that case we recognized the right of an employer to recoup his losses from a negligent employee. . . . We also held that the insurer of the employer may recover against the insurer of the negligent employee."

The court held that the company covering the one liable on a vicarious basis only could recover from the insurer of the primarily negligent party. In a case more factually similar to the present, Maryland Cas. Co. v. Employers Mutual Liability Ins. Co., 208 F. 2d 731 (2nd Cir. 1953), plaintiff covered the employer and "any person while using an owned automobile," while defendant insured the employer alone. An employee was negligent, causing an injury. After plaintiff settled the claim of the injured party, he sought recovery from defendant, which had refused to assist in the defense or the settlement. In reversing the district court,[9] the Court of Appeals, through Judge Learned Hand, stated, at page 732, "We shall try to show that to allow plaintiff to recover any part of the payment, made in settlement of this action, would result in a circuity of action." The court goes on to say that if

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[8]Affirming United States Fidelity & Guaranty Co. v. Church, 107 F. Supp. 683 (N. D. Cal. 1952).

[9]112 F. Supp. 272 (D. Conn. 1953).

plaintiff recovered part of the loss from defendant, both would have been subrogated to the rights of the employer. Since the law of Connecticut, where the transaction arose, allows recoupment from a negligent servant,[10] defendant, as insurer of the employer, could have obtained a judgment against the negligent employee, and if the employee paid this sum, he could have recovered it from the plaintiff, his insurer. This would amount to a complete circuity of action. Under this state of facts, the court held that plaintiff could not recover any part of the amount paid in settlement from defendant.

The effect of these cases, or the rule to be drawn from them, may be stated in this way: An insurer providing extended coverage is ultimately liable as against an insurer providing coverage only to the named insured, where the named insured's liability is vicarious only, and that named insured has a right of recovery over against the person or persons primarily liable, to whom coverage has been extended only by the extended coverage provision of the first insurer.

The fact that a settlement of the state court action was made by Pacific and Hartford does not alter their rights. A similar settlement was reached in the United case, 179 F. 2d at 841-842, where both insurers paid equal sums to the injured party conceding joint liability to the named insured as in this case. The theory in United was that the insurer of the primarily liable tort-feasor was obligated to reimburse the insurer of the named insured for all expenditures reasonably and necessarily made on be-

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[10]As does the law of California. See footnote 7, *supra*, and discussion of Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., *supra*.

half of the named insured, including a reasonable and necessary settlement of the claim of the injured party. The settlement by the two insurers here admitted Neil's liability to Carter and avoided the necessity of wading through to final judgment in his case in the state court.

Neil has never proceeded against the negligent driver or flagman for contribution for their wrongful acts. But such is not necessary under the three cited cases, *supra*. Those decisions removed the need for proceeding through the tangle of claims involved to determine ultimate liability. Both the United and Maryland Casualty cases speak in terms of avoiding multiplicity of suits or circuity of action. The relief sought in a declaratory judgment action of this nature is broad enough to allow the court to settle all issues without forcing the parties to proceed separately against those who may be liable. In the United case, both parties stipulated and agreed to have all potential issues decided in the single action; in this case, no such stipulation was made, but Hartford's complaint, we believe, is expansive enough to allow this court to decide all necessary issues to a final determination of the matter.[11] The agreement made between Hartford and Pacific regarding the settlement of the state court action adds support to this conclusion.[12] Even more persuasive is the

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[11]Hartford's complaint concludes as follows: "Wherefore, this plaintiff prays that the Court make its decree ascertaining and declaring the rights of the parties in respect to the various contracts of insurance prescribed in this amended complaint . . . and for such other and further relief as may seem just and meet."

[12]Excerpts from the Hartford-Pacific settlement agreement follow: "It is further agreed that on the adjudication in the declaratory relief action of the liabilities of the parties . . . that they will immediately pay . . . any sums that they would have been required to pay had that adjudication or such settlement been had

fact that to render a declaratory judgment in this case the court must inquire into the respective liabilities of all the parties. The trial judge was well aware of this in making his findings of fact and conclusions of law which went beyond the mere declaration of the rights of the two insurers. His judgment took into consideration the liability of Neil's employees, both supervisory and other, and the rights of Neil to proceed against them, and we will consider all the aspects of the controversy in reaching our decision.

Hartford maintains that there is no primary or secondary insurance theory applicable in California, citing three California appellate cases containing language to that effect.[13] The same argument was raised and rejected by this court in Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., *supra*, at 659-660. Our reexamination of the California cases leads us to a like conclusion, that in a situation such as is presented in the case at bar, where two insurance companies seek to determine the nature and extent of their liabilities *inter se*, the law is correctly stated in the United and Canadian Indemnity cases, ***supra.***

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before settlement or a judgment in the case of Carter vs. Neil and the mining company . . .

"It is understood that this agreement is intended to preserve all of the rights of each party hereto under their respective policies and under the facts of the case and is intended to prevent any claim of waiver . . ."

[13]Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal. App. 2d 288, 114 P. 2d 34 (1941); Air Transport Mfg. Co. v. Employers Liability Assur. Corp., 91 Cal. App. 2d 129, 204 P. 2d 647 (1949); Employers Liability Ins. Corp. v. Pacific Employers Insurance Co., 102 Cal. App. 2d 188, 227 P. 2d 53 (1951). And see Traders & Gen. Ins. Co. v. Pacific Employers Ins. Co., 130 Cal. App. 2d 158, 278 P. 2d 493 (1955).

The trial court found that Neil was a tort-feasor jointly with the truck driver and the flagman, because of the negligenge of three supervisory employees, and any action by Neil against the truck driver and the flagman would be seeking contribution between joint tort-feasors, frowned on by the California courts in actions where their concurrent negligence makes them joint tort-feasors. Smith v. Fall River Jt. Union High School Dist., 1 Cal. 2d 331, 34 P. 2d 994 (1934); Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389 (1921). Furthermore, Neil would then be subject to a defense of contributory negligence and would be profiting from its own wrong. If, however, Neil is liable on an imputed basis, because of *respondeat superior*, then it would have the right of recovery against its own employees, and that right would pass to Pacific through subrogation. Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875 (1908); Myers v. Tranquility Irr. Dist., 26 Cal. App. 2d 385, 79 P. 2d 419 (1938).

There is no dispute as to the negligence of the truck driver and the flagman in failing to ascertain that Carter and other Electric Company personnel were working below the retaining wall. Pacific contends that the trial court erred in its finding that the supervisory employees of Neil were negligent, that such negligence was a proximate cause of the injuries to Carter, and that this would bar any action of Neil against the truck driver and the flagman because Neil would be *in pari delicto* and would be subject to the defense of contributory negligence.

The supervisory employees which the trial court found to be negligent were Andrew Jensen, Neil's superintendent of construction; Robert Grace, labor foreman in charge of the flagman; and Hubert Jones, equipment or excavation foreman. Their depositions were read into evidence.

Jensen stated that the day before the accident he informed the Electric Company crew they were "premature and they better leave until we were ready for them." No such orders were relayed on the day of the accident, although Jensen said he ordered Grace "to get up there (to the retaining wall site) and clarify it." Grace, who was in direct charge of the backfilling operation, said that he received no word from Jensen as to stopping the operation. Grace made periodic checks of the backfilling operations, but at the time of the accident he was working with another crew on a different project. He testified he was going to check the backfill operation later. Jones testified that he was unaware the fill was nearing the top of the wall, and no other testimony connects him with the accident. None of the three supervisory employees was present when the accident occurred.

The foreman of the Electric Company crew indicated that he was not told to stay out of the backfilling or substation site, although Neil's employees knew the crew was present. Shortly before the accident, he stated, the flagman had told him that they were not going to dump that morning.

The trial court's finding on this testimony that such negligence rendered Neil liable as a joint tort-feasor and not solely on the basis of *respondeat superior* is, in our opinion, erroneous. Under California law, when the tort is committed in accordance with the express orders of corporate officers or agents carrying out corporate policy, the corporation is a joint tort-feasor [Benson v. Southern Pacific, 177 Cal. 777, 171 Pac. 948 (1918); McInerney v. United Railroads, 50 Cal. App. 538, 195 Pac. 958 (1920)], and the corporation is jointly liable when the tort by the employee is expressly ratified by the corporation. Jameson v. Gavett,

22 Cal. App. 2d 646, 71 P. 2d 937 (1937); Davison v. Diamond Match Co., 10 Cal. App. 2d 218, 51 P. 2d 452 (1935). However, if the tort is the undirected act of the employee acting within the scope of his employment, the corporation is liable solely under the doctrine of *respondeat superior*. Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875 (1908). The testimony shows that the three supervisory employees failed to take steps to prevent the accident. It cannot be said on this state of the record that they were carrying out corporate policy, and there is no evidence that their acts, or omissions, were ratified by Neil.

Neil, having discharged its obligation to Carter under the doctrine of *respondeat superior*, had a right of recovery over against all the negligent employees, and this right passed to Pacific and to Hartford. As the insurer of two negligent employees, the truck driver and the flagman, under the extended coverage provisions of its policy, Hartford is defeated in its right of subrogation because it cannot recover from its own insured. This leaves Pacific as sole subrogee and gives it the right to recover over against Hartford as the insurer of the truck driver and the flagman. The fact that the three supervisory employees were not within Hartford's extended coverage provisions does not alter the situation. Since there is no right to contribution between joint tort-feasors each concurrently liable, Hartford, as the insurer of two of the employees, must, under the terms of its policy, bear the loss occasioned by the settlement of Carter's action for damages.

The trial court held that Pacific's subrogation rights, if any, would have accrued on the date of the settlement with Carter, January 27, 1951, and because the action for de-

claratory relief was tried in March 1952, Pacific at that time would be barred by a one-year statute of limitations[14] pertaining to an action against the truck driver and the flagman. We find this ruling to be erroneous for two reasons.

Although an insurer subrogated to the rights of an insured is subject to the same statute of limitations as the insured [Automobile Ins. Co. v. Union Oil Co., 85 Cal. App. 2d 302, 193 P. 2d 48 (1948)], still an action by Pacific as subrogee of Neil against the two employees would not be a personal action but rather an action for the enforcement of a right based upon an implied contract of indemnity [Ohio Casualty Co. v. Capolino, 44 Ohio L. Abs. 564, 65 N. E. 2d 287 (1945)], and a two-year statute of limitations would be applicable.[15] Thus, either Neil or Pacific could have brought an action against the employees prior to January 27, 1953.

More persuasive, however, is the fact that prior to the time Carter's action for damages was settled, Pacific and Hartford were parties to an agreement, dated January 15, 1951, which contemplated the settlement and which had been entered into to protect any claim of waiver of the provisions of the policies of insurance or from any claim of voluntary action, and to preserve all such rights to the contracting parties. It also contained a recital relating to the pendency of the action for declaratory relief "which suit has as its purpose the declaration of the liabilities of each of the said insurance companies in respect

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[14]California Code of Civil Procedure, Sec. 340(3).

[15]California Code of Civil Procedure, Sec. 339(1); see Restatement, Restitution, Sec. 96.

to" the Carter action. Other pertinent provisions of the agreement are set forth in note 12.

We believe that under the agreement the parties expressly waived any rights predicated on the passage of time, and Hartford may not now prevail in its attempt to alter the intent of the parties so clearly expressed in the agreement.

The judgment is reversed and remanded with directions to enter judgment for Pacific against Hartford in the amount of $11,160, which sum represents the money expended by Pacific in the Carter action.

(Endorsed:) Opinion. Filed Nov. 16, 1955.

Paul P. O'Brien, Clerk.

Opinion of the United States District Court.

[Title of District Court and Cause.]

MEMORANDUM TO COUNSEL

Upon the submission of the case, the court made certain tentative findings of fact and submitted them, together with the application of the law to the facts for counsels' consideration. The Court now decides the matter.

1. The court finds that there was negligence on the truck driver's part and that this was a proximate cause of the accident.

2. The Court finds that there was negligence on the flagman's part, and that this was a proximate cause of the accident.

[In view of statements of counsel at the trial and in their briefs, no comment is necessary]. [94]

3. The Court finds that the truck was a "hired" automobile rather than a non-owned automobile under the Hartford policy.

Hartford contests this finding and both counsel argue about consideration. Neil Company was doing the work under a cost-plus contract. Accordingly, the court finds that the truck was "hired" and comes within the cost-plus contract whether it was mentioned or not. Neil used certain equipment of the Mining Company and charged the Mining Company for equipment which Neil furnished. Thus, the loan of the truck affected the contract and the final amounts due from the Mining Company under the cost-plus contract. The court considers that the cost-plus contract itself was sufficient in its operation and interpretation as shown by the acts of the parties to make the truck a "hired" one.

But if we must look to some separate contract we can still spell one out. The Mining Company lent the truck to Neil Company; provision was made as to who paid gas and oil and greasing; who paid repairs; who stood depreciation. This is all found in the acts of the parties. The loan of the truck relieved Neil Company of a legal responsibility to furnish trucks under Art. IV of the cost-plus contract and thus benefited Neil. The Mining Company also benefited in the ultimate cost of the job. Here is a contract spelled out by the acts of the parties, based on a sufficient consideration. [95]

4. The court finds that at time of the accident the truck in question was not "away from the premises * * * controlled by the insured," (Neil Co.) of Pacific Employers.

Pacific Employers contests this finding. The court thinks this finding good on alternative grounds:

(1) The policy was entitled, "Comprehensive General Liability Policy." As the term "control" is used in "Exclusion (a)" the court interprets the contract to cover the jobs and premises on which the insured (Neil Co.) worked.

(2) The easement in gross enjoyed by the Electric Company was not such a right as to destroy the control of the job and the premises by Neil Company. In the majority of cases some such easement could be found if a title search of the premises was made.

(3) The easement in gross would not affect Neil Company's control until exercised. It was never exercised by the Electric Company on those portions of the premises where the truck was loading and dumping rock. This portion of the premises was never intended for the Electric Company's use and was occupied by and in sole possession of Neil at time of the accident.

(4) The mere fact that there was an exercise of the easement, (*i.e.* entry of the premises) on other portions of the premises cannot relieve Pacific of liability. If this were true there could be avoidance of liability by an insurance carrier in policies of this kind. The fact that a trespasser came on to a corner of the premises, camped and slept would be argued to the effect that he took control of that corner, etc., hence no liability for accidents elsewhere on the premises.

(5) Nor did the exercise of the Electric Company of its easement in gross in its building of the electric building [96] and its work around it, contribute proximately to the happening of the accident. The Electric Company and its employees were not negligent. They were passive actors against whom the negligence of Neil and its employees operated.

(6) Finally, the court submits that the concept of "exclusive control" asserted by Pacific is an absurdity. Pacific complains of the right of entry given by the easement. Note the following acts of which a court could probably take judicial notice which would, under such reasoning, destroy exclusive control:

(a) The visits of various inspectors or State, County or City to the premises, concerning the work;

(b) The visits of owners or their representatives to the premises, inspecting or looking over the work;

(c) The visits of material suppliers delivering material to the premises.

5. The court finds that negligence of the Neil Company was a proximate cause of injury to Carter, *i.e.*, acts and omissions of its supervisors or employees under its supervisional charge other than the truck driver:

(1) In the management of loading and dumping operation;

(2) But not as to the safety of the place furnished for Carter in which to work.

Pacific does not contest the findings but argues its right of subrogation against employees of Neil Company specifically insured by Hartford and the necessity to avoid circuity of action.

The court believes that Hartford has adequately answered this contention in its reply brief. [97]

(1) In a suit by Pacific against the truck driver and flagman in exercise of, and standing in the place of Neil Company, the defense of contributory negligence of the supervisorial employees of Neil would bar recovery;

(2) The statute of limitations has run on Neil's claim against the employees, to which claim Pacific would have rights of subrogation;

(3) Such an action would, in substance, require contribution between joint tort-feasors as argued in Hartford's reply brief, p. 4, lines 13 to 21;

(4) Since not only the flagman and truck driver (insured by Hartford) but also the supervisorial employees of Neil contributed proximately to happening of the accident, on the basis of common sense alone Neil Company could not sue its truck driver and flagman and recover. It would be profiting by its own wrong.

6. The court finds the Mining Company was not negligent. (Not disputed by parties.)

On the basis of these facts, the court concludes that under the policies, the loss is distributed equally between the two carriers, Hartford and Pacific.

Hartford to draw findings, conclusions and judgment, serve and file, pursuant to the rules of this court.

Dated: December 30, 1952.

/s/ JAMES M. CARTER,
U. S. District Judge.

[Endorsed]: Filed December 30, 1952. [98]

JUN 19 1956

IN THE

Supreme Court of the United States

October Term, 1955

No. 118

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,

Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellee.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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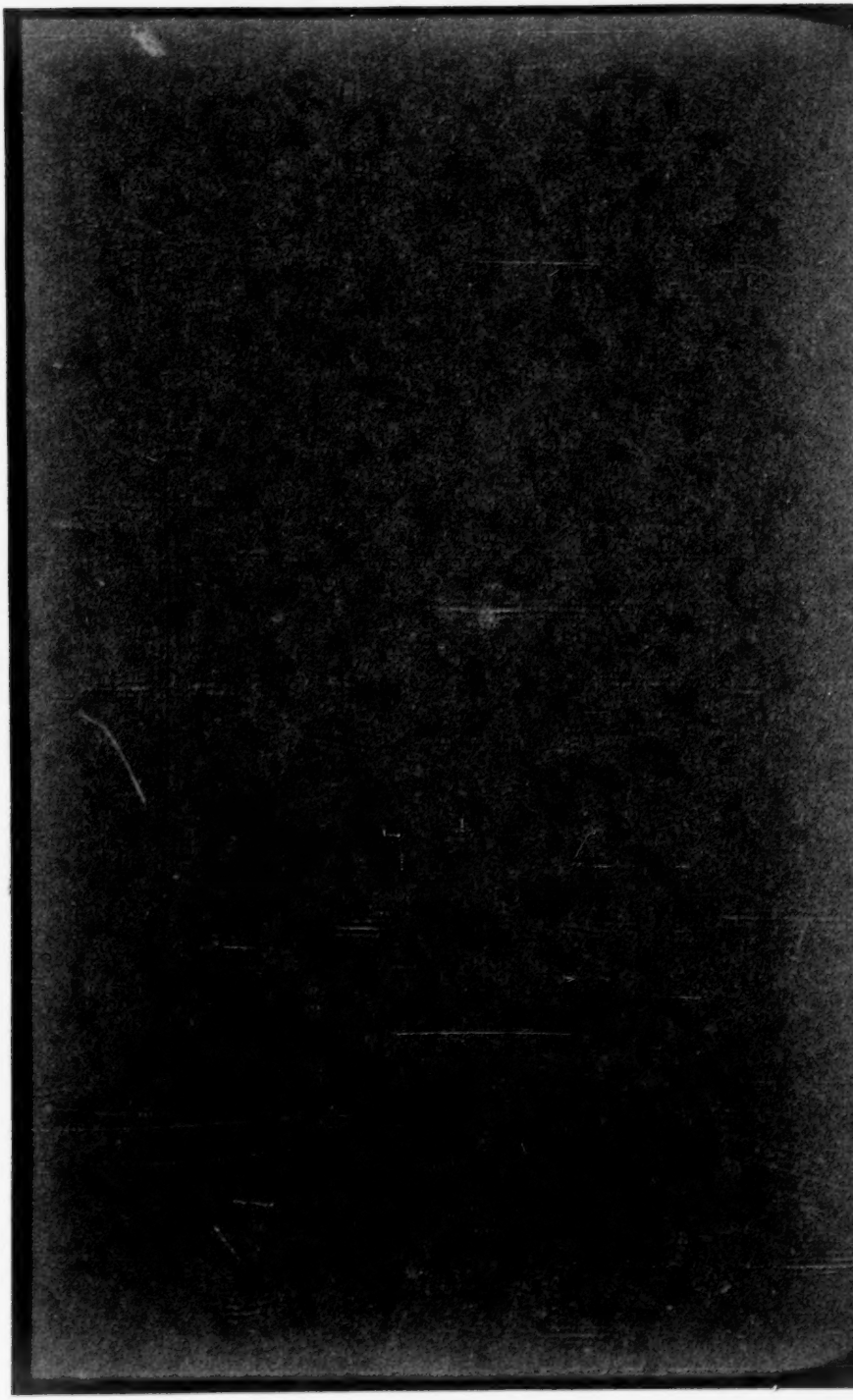

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IN THE

Supreme Court of the United States

October Term, 1955

No. 981

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,
Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Appellee.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, Pacific Employers Insurance Company, prays that a writ of certiorari in this matter be denied, and in support thereof files this brief.

ARGUMENT.

Answer to First Question.

The Supreme Court of the State of California Has Recently Set Forth the Rule of Primary and Secondary Liability Insurance and Has Directly Disapproved Any Contrary Implications in the Four Decisions Relied Upon by Petitioner.

Petitioner contends that when this court adopted the rule of primary and secondary liability between insurance carriers, it failed to follow the law of the State of California and that therefore its decision was contrary to *Erie R. Co. v. Tompkins*, 304 U. S. 64. Petitioner's petition for certiorari is dated May 25, 1956. Under date of May 4, 1956, the California Supreme Court in *Continental Casualty Company v. Phoenix Construction Company*, 45 Advance California Reports 429, held that California *does* follow the rule of primary and secondary liability between insurance carriers, and expressly disapproved any contrary implications in certain California District Court cases. At page 434 of that case, the California Supreme Court states:

> "Where a judgment has been rendered against an employer for damages occasioned by the unauthorized negligent act of his employee, the employer may recoup his loss in an action against the negligent employee. (*Popejoy v. Hannon* (1951), 37 Cal. 2d 159, 173; *Bradley v. Rosenthal* (1908), 154 Cal. 420, 423; *Johnston v. City of San Fernando* (1939), 35 Cal. App. 2d 244, 246; *Myers v. Tranquility Irr. Dist.* (1938), 26 Cal. App. 2d 385, 389; *Ledgerwood v. Ledgerwood* (1931), 114 Cal. App. 538, 542-543; *Rest., Restitution*, 418-419, Section 96, 35 Am. Jur. 530-531, Section 101; 56 C. J. S. 502, Section 79; see also, *Aynes v. Winans* (1948), 33 Cal. 2d 206,

208-209); that is, as between employer and employee in such a situation, the obligation of the employee is primary and that of the employer secondary. Respondents cite *Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.* (1941), 45 Cal. App. 2d 288, 293; *Air Transport Manufacturing Co. v. Employers Liability Assurance Corp.* (1949), 91 Cal. App. 2d 129, 132; *Employers Liability Assurance Corp. v. Pacific Employers Insurance Co.* (1951), 102 Cal. App. 2d 188, 192; and *Traders, etc., Insurance Co. v. Pacific Employers Insurance Co.* (1955), 130 Cal. App. 2d 158, 165-166, as supporting a contrary view; such cases are broadly distinguishable on their facts, but it would unduly extend this opinion and serve no useful purpose to individually discuss and differentiate them as any implications therein contrary to the long established rule above stated must be deemed disapproved.

"Under equitable principles of subrogation, the insurer of the employer who has been compelled to pay the judgment against the employer may recover against the negligent employee or the employee's insurer. (*Canadian Indemnity Co. v. U. S. F. & G.* (1954), 9th Cir., 213 Fed. 2d 658, 659; see also, *Maryland Casualty Co. v. Employers Mutual Liability Insurance Co.* (1935), 208 Fed. 2d 731; *United Pacific Insurance Co. v. Ohio Casualty Insurance Co.* (1949), 9th Cir., 172 Fed. 2d 836, 840 (Note 5) 846-848.)"

In other words, if there was ever any doubt as to the California law on petitioner's First Question, this doubt has been completely dispelled by the above cited case of the California Supreme Court, and if there was ever any doubt whether the instant case was contrary to the law of the State of California in this regard, that doubt no longer exists.

Answer to Second Question.

The Neil Company Was Not Itself Negligent, but Was Only Liable Under the Doctrine of Respondeat Superior; Therefore, It Is Not a Joint Tort Feasor With Its Employees, but Had a Right to Recoup Its Loss in an Action Against the Negligent Employees.

Briefly, it has been petitioner's contention, and still is its contention, that the Neil Company itself was negligent because of the negligence of its supervisorial employees, and therefore it was liable not alone under the doctrine of *respondeat superior,* but as a joint tort feasor. If, of course, the Neil Company was a joint tort feasor with its employees, then the law is that one joint tort feasor cannot recoup from another. Therefore, argues petitioner, the Neil Company had no right of recoupment against its employees; and, finally, the insurance company insuring the negligent employee would not be the one ultimately liable to the insurance company insuring only the Neil Company. The fallacy in this chain of reasoning is that the Neil Company was *not* a joint tort feasor, but was liable for the negligence of its employees (both non-supervisory and supervisory) only under the doctrine of *respondeat superior.*

The Court of Appeals has properly covered this point, beginning on page 14 of the appendix to petitioner's brief, the last paragraph of that page. The California law on this point may be summed up as follows:

> When the tort is the undirected act of the employee, who is nevertheless acting within the scope of his employment, the corporation is liable solely under the doctrine of *respondeat superior.* (*Bradley v. Rosenthal,* 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171; *Tolley v. Engert,* 71 Cal. App. 439, 235 Pac.

651; *Plott v. York*, 33 Cal. App. 2d 460, 91 P. 2d 924; *Freeman v. Churchill*, 30 Cal. 2d 453, 188 P. 2d 4.)

An example of the difference between a directed act of an employee and an undirected act of an employee within the scope of his employment is as follows: suppose the employer tells a truckdriver employee to drive a truck load of merchandise from Los Angeles to San Bernardino and on the way the employee causes an accident because of his excessive speed. The proximate cause of the accident is the excessive speed, and this is not a directed act of the employer. Under such circumstances, the employer is liable only under the doctrine of *respondeat superior*. Suppose, on the other hand, that the employer tells the same employee to drive a truck load of merchandise from Los Angeles to San Bernardino and to make the trip within a length of time which requires excessive speed. If an accident then occurs, because of the excessive speed, the employee is performing an act in the way directed, and the employer is liable as a joint tort feasor.

In the instant case, the acts of the negligent employees (both supervisory and non-supervisory) were not *directed* acts. They were all acts of *omission*. None of them were authorized or directed or ratified acts of the Neil Company. If the employee is doing a directed act in the scope of his employment, then his employer is a joint tort feasor (*Benson v. Southern Pacific*, 177 Cal. 777, 171 Pac. 948), but if he is doing an undirected act within the scope of his employment, then the employer, while liable for this act under the doctrine of *respondeat superior*, is not a joint tort feasor. (*Bradley v. Rosenthal*, 154 Cal. 420, 97 Pac. 875.) The Court of Appeals rightly determined that this case came within the rule of *Bradley v. Rosenthal* rather than the rule of *Benson v. Southern Pacific*.

Answer to Third Question.

The Decision by the Court of Appeals on the Applicable Statute of Limitations Is Not Contrary to California Law.

Petitioner's contention that insurer's subrogation right is subject to the same statute of limitations as the rights of the insured is a correct statement of law (*Automobile Insurance Co. v. Union Oil Co.*, 85 Cal. App. 2d 302, 193 P. 2d 48), but it is not correctly considered in its application to this case in petitioner's brief. Petitioner mistakenly goes on to assume, without citation of authority, that the insured is bound by the same statute of limitations in his suit for indemnification that the injured party was bound by in his original tort action. Such is not the law.

The California law supports the position of the Court of Appeals that the right of the employer to recoup or indemnify himself for sums paid out because of the undirected tortious acts of his employees is based upon an implied contract of indemnity. See: *Restatement of Restitutions*, Section 96, pages 418-419, and *Bradley v. Rosenthal* (*supra*) at page 423, where the court quotes from *Cooley on Torts*, as follows:

> "as between the company and its servants, the latter alone is the wrongdoer and calling upon him for *indemnity*, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself." (Emphasis added.)

By Section 2772 of the Civil Code of California:

> "Indemnity is a *contract* by which one engages to save another from a legal consequence of the conduct of one of the parties, or some other person." (Emphasis added.)

The contract between the employer and negligent employee for indemnity is implied. (Cal. Civ. Code, Sec. 2779; 13 Cal. Jur. 981, Note 10.) An action upon an implied-in-law contract is controlled by Code of Civil Procedure, Section 339(1), of the State of California which provides a two-year period in which the action should be brought. (*Crystal v. Hutton*, 1 Cal. App. 251, 81 Pac. 1115; *Bray v. Cohn*, 7 Cal. App. 124, 93 Pac. 893.) The present declaratory relief action came to trial a little over one year, but less than two years from the time the Neil Company settled the case of *Carter v. Neil*. Therefore, the time in which the employer could recoup from the negligent employee had not expired. The statute of limitations for recoupment or indemnity by Neil Company against its negligent employees had not at that time run.

Answer to Fourth Question.

By Stipulation, the Parties Agreed to Pay Any Sums They Would Have Been Required to Pay Had the Adjudication Taken Place Prior to the Settlement in the Case of Carter vs. Neil, and Therefore the Parties Waived as Between Themselves the Defense of the Statute of Limitations.

In order to prevail in its argument that respondent's declaratory rights have been barred by the statute of limitations, petitioner has a double burden: first, petitioner must show that the one year statute of limitations is applicable to Neil's right to recoup from its negligent employees; and, secondly, petitioner must show that the parties to this action did not agree that the declaratory relief should be adjudicated on the basis of the right of the parties *before* the settlement of the case of *Carter v. Neil* (at which time it could not possibly be validly con-

tended that the statute of limitations had run upon the rights of either party).

Petitioner and respondent entered into a written agreement on this point which we believe is clear. This agreement was received into evidence as Plaintiff's Exhibit 1 [R. pp. 132 to 136]. Petitioner contends that this agreement could not waive the statute of limitations as to the two negligent employees of the Neil Company. Such is true. But, it could waive the defense of the statute of limitations so far as it was available to petitioner in this declaratory relief action in which the rights and obligations between petitioner and respondent were sought to be untangled.

The relevant portions of this agreement are as follows:

> "7. That it is the desire of the parties to this agreement that such negotiations, or payment thereunder in case of settlement, shall be protected from any claim of waiver of the provisions of the policies of the parties . . .
>
> "It is hereby agreed by the parties that settlement and payment of said claim of Richard D. Carter against Neil shall not be with any prejudice to any of the rights under the policies of the Hartford and the Pacific.
>
> "It is further agreed that on adjudication in the declaratory relief action of the liabilities of the parties under their several policies or settlement of said declaratory relief action by the parties before then, *that they will immediately pay in acordance with the adjudication when the judgment is final* or upon such settlement of the declaratory relief action, *any sums that they would have been required to pay had that*

adjudication or such settlement been had before settlement of a judgment in the case of Carter v. Neil and the mining company. (Emphasis added.)

"It is understood that this agreement is intended to preserve all of the rights of each party hereto under their respective policies and under the facts of the case and is intended to prevent any claim of waiver."

So far as the point made by petitioner is concerned, the important part of this agreement is that the parties would pay any amount which they would have been required to pay had the adjudication in this declaratory relief action been had *before* the settlement in the case of *Carter v. Neil.* Certainly, if this adjudication in the declaratory relief action were *before* the settlement in *Carter v. Neil,* it could not be validly contended that the statute of limitations had run upon any right of recoupment growing out of a judgment in *Carter v. Neil.* The very purpose of the agreement was to prevent a claim of waiver of rights by the passage of time.

Finally, petitioner objects that the order of the Court of Appeals should not provide for a money judgment. But the parties in submitting this declaratory relief matter to the court for determination requested that just such a judgment be rendered. In the agreement, each agrees that it will immediately pay in accordance with the adjudication "any sums" that it would have been required to pay had the adjudication been before the settlement of *Carter v. Neil* case. It becomes immaterial whether the court makes a declaratory finding that $11,160 is due

from Hartford to Pacific under the terms of their policies and the applicable law or whether the court orders such amount to be paid since the parties agree that they will pay in accordance with the declaratory relief judgment.

Wherefore, respondent respectfully requests that no writ of certiorari issue in this matter.

Dated: June 14, 1956.

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